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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE, et al, appellants,
v.
HIRAM WALKER & SONS (LTD.). } No. 615.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

THE ANCHOR LINE (HENDERSON BROTHERS) (Ltd.), appellant,
v.
GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS for the Port of New York. } No. 639.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS IN NO. 615 AND FOR THE APPELLEE IN NO. 639.

INTRODUCTORY STATEMENT.

These are suits to enjoin officers of the United States from enforcing the provisions of the eighteenth amendment to the Constitution and the national prohibition act[1] against shipments of liquor (*a*) from

[1] Called interchangeably "national prohibition act," "prohibition act," and "Volstead Act."

one foreign country through territory of the United States to another foreign country and (*b*) from a foreign country into the port of New York for transshipment to another foreign country. The right to transport liquor into and through the United States for export to points outside the United States is asserted under the provisions of section 3005 of the Revised Statutes and Article XXIX of the Treaty with Great Britain proclaimed July 4, 1871. Whether those provisions ever conferred the right claimed, and if so, the extent to which such right has been modified or abrogated by the eighteenth amendment and the prohibition act, are the questions presented. The cases come directly to this court under section 238 of the Judicial Code on the ground that there is drawn in question (1) the construction and application of the Constitution of the United States; (2) the construction or validity of a treaty and (3) the constitutionality of a law of the United States. The two lower courts having arrived at opposite conclusions, giving rise to much confusion and embarrassment in the enforcement of the prohibition act, the necessity of a prompt decision by this court is manifest.

THE FACTS IN CASE NO. 615.

Bill of complaint.

Hiram Walker & Sons (Ltd.), a corporation of the Province of Ontario, brought its bill in the United States District Court for the Eastern District of Michigan to enjoin the collector of internal revenue

and the collector of customs for that district from interfering with and preventing the shipment of whiskey from its plant at Walkerville, Ontario, into the port of Detroit for conveyance to other ports of the United States to be there exported to points outside the United States. (Rec. 1–11.)

The bill alleged that pursuant to section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871 plaintiff has for many years conducted a large and profitable business in the exportation of whiskey through the United States to foreign countries; that in 1920 a total of 86,815 cases, aggregating $700,982 in value, was exported in this way, with a loss of only 286 cases of the value of $2,330; that if plaintiff were compelled to convey its whiskey to Mexico, South and Central America otherwise than in transit in bond through the United States, the increased transportation costs and delay in deliveries would greatly impair if not destroy its foreign business. (Rec. 3–4.)

That on February 14, 1921, plaintiff presented to agents of the collector of customs at Detroit 25 cases of whiskey to be conveyed in bond through the United States to customers in Mexico; that defendant, collector of customs, purporting to act under the Volstead law, seized said shipment and still retains the same; that on July 14, 1921, plaintiff notified agents of defendant collector of customs that it desired to make a further shipment of liquor through Detroit to New Orleans, for transshipment by water to Puerto Barrios, in Guatemala; that representatives of the collector replied that such shipment on arrival

at the port of Detroit, would be seized unless plaintiff should obtain a permit from the State prohibition director; that such permit was duly applied for and refused; and that plaintiff is informed and believes that the defendant, collector of internal revenue, acting as agent of the Commissioner of Internal Revenue, under the Treasury Department's interpretation of the Volstead Act, will institute criminal proceedings against plaintiff and its property offered for export through the United States. (Rec. 4–7.)

The bill then avers that the eighteenth amendment relates only to intoxicating liquors "for beverage purposes"; that there is no provision either in the eighteenth amendment or in the Volstead Act declaring or making unlawful the conveyance of whiskey in bond through the United States for export to foreign countries; that such conveyance is expressly authorized by section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871, and that if said Volstead Act shall be construed so as to forbid or prevent such conveyance in transit in bond "then such construction would make such act unconstitutional." (Rec. 7.)

The prayer is that both defendants be enjoined from further interfering with the in-transit shipment of whiskey from plaintiff's plant through the United States to foreign countries; that defendants be required to return to plaintiff the shipment of whiskey seized as alleged and which they are now holding; and that defendants be enjoined from enforceing the provisions of the Volstead law against plaintiff

or its property on the ground that the transportation of whiskey in the manner described constitutes a violation of such law. (Rec. 10–11.)

A rule to show cause was issued and a temporary restraining order granted (Rec. 12–14).

The answer.

Defendants thereupon answered, admitting substantially all allegations of fact set up in the bill, but denying the conclusions of law as to the interpretation of the eighteenth amendment and the Volstead Act, and the applicability of section 3005 of the Revised Statutes and the Treaty of 1871 to the transshipment of whiskey. (Rec. 16–18.)

In addition, the answer averred that the continued transportation of whiskey through the United States would result in a portion of said whiskey remaining in the United States in violation of law due to thefts and other unlawful withdrawals while in storage and en route. Counsel stipulated that the issues made by bill and answer were issues of law which could be determined without the necessity of taking proof; and further, "that the whiskey in controversy was and is intended for consumption as beverage whiskey."

The decision.

District Judge Tuttle, on final hearing, entered a decree permanently enjoining the defendants in accordance with the prayer of the bill. (Rec. 20–26.)

His opinion may be reduced to the following propositions: (1) That while, by a strict construction, the

Volstead Act in terms prohibits the shipments under consideration, yet under the doctrine of the *Holy Trinity Church Case*, 143 U. S. 457, the court may look beneath the words to the purpose and intendment of the act; (2) that as the eighteenth amendment expressly relates to liquors intended "for beverage purposes," and as Congress has expressed its intention that the Volstead Act should be construed "to the end that the use of intoxicating liquor as a beverage may be prevented," it follows that the underlying purpose of the act was the prevention of the use of intoxicating liquor as a beverage *within the United States;* (3) that the prohibition in the amendment and the act against the "exportation" of intoxicating liquor from the United States does not negative the intention thus attributed to Congress to confine their application to the use of such liquor within the United States; (4) that Congress passed the Volstead Act with knowledge of the right to transship enjoyed under existing acts and treaties, and the failure expressly to repeal gives rise to an inference that such right should continue; (5) that as repeals by implication are not favored, the Volstead Act will not be construed to have repealed section 3005, Revised Statutes, if effect can be given to both; (6) that for like reasons a treaty between the United States and a foreign Government will not be regarded as abrogated by a subsequent statute unless an intention so to do is clearly and unequivocally indicated; (7) that Article XXIX of the treaty of 1871 has not expired by limitation nor been expressly abrogated; (8) that the contention that continued

shipments of whiskey through the United States will result in unlawful removals and thefts is overcome by the presumption that public officers will faithfully perform their duty; and (9) that the express exception in section 20, Title III, of shipments through the Panama Canal and over the Panama Railroad is not indicative of an intention to prohibit all other "in transit" shipments. (Rec. 20–26; 275 Fed. 373.)

THE FACTS IN CASE NO. 639.

Bill of complaint.

In this case The Anchor Line (Ltd.), a corporation of Great Britain, engaged in the operation of steamships from ports of the United Kingdom to ports of Europe, Canada, and the United States, filed its bill and amended bill in the United States District Court for the Southern District of New York to prevent the collector of customs from seizing, under the Volstead Act, shipments of intoxicating liquors transported by its steamers from foreign ports to the port of New York for transshipment to other foreign ports. (Rec. 14–24.)

The amended bill alleges that plaintiff during the past three years has transported large quantities of wines and intoxicating liquors from Glasgow to the port of New York, where such liquors were transshipped to vessels destined for the West Indies and other countries outside the jurisdiction of the United States, and that a substantial part of plaintiff's revenue is derived from the transportation of such liquors. (Rec. 15.)

Section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871 are set up as in the Walker case, and the same rights thereunder are alleged. (Rec. 15, 17–18.)

It is further alleged that plaintiff has contracted with a shipper in Glasgow to transport 25 cases of whiskey from Glasgow to Hamilton, Bermuda; that said whiskey has been shipped and is now in transportation on the S. S. *Cameronia*, on the high seas; that such liquor is to be transshipped at New York from the *Cameronia* to another vessel plying between New York and Hamilton; and that defendant collector of customs, acting under the direction of the Treasury Department, has threatened to seize and forfeit said whiskey on arrival and has refused to issue permits for transshipment in the port of New York. (Rec. 18.)

Plaintiff is advised by counsel and therefore avers that section 3005, Revised Statutes, has not been impaired or repealed by the Volstead Act; that the Volstead Act does not apply to the transshipment of liquors at ports of the United States in the manner set forth in the bill; that the interpretation given by the Attorney General and the Treasury Department to the effect that it applies to such transshipments is erroneous; and that if the Volstead Act purports to prohibit such transshipments it is unconstitutional and void. (Rec. 16–17, 19–20.)

As in the Walker case, the prayer was that the defendant collector be enjoined from enforcing the provisions of the Volstead law against the plaintiff,

and that he be enjoined from refusing plaintiff a permit to transship liquors in accordance with section 3005 of the Revised Statutes. (Rec. 20.)

On July 22, 1921, an order was entered by the District Court directing the United States marshal on arrival of the S. S. *Cameronia* to take into custody for safekeeping the consignment of whiskey mentioned in the bill of complaint. (Rec. 49.)

The answer.

Defendant filed a combined motion to dismiss and answer which admitted the principal allegations of fact but expressly denied that the treaty of 1871 was still in effect and denied all conclusions of law pleaded in the bill. (Rec. 24–30.)

For a separate and distinct defense defendant alleged that the amount of liquor transshipped at the port of New York during the past three years has been large; that in all cases of such liquors arriving by vessel the responsibility of the importing vessel appears to cease forty-eight hours after landing of the shipment or upon delivery to a Government truckman or lighterman; that such liquors are frequently to be exported by a vessel berthed at a different dock and scheduled to sail sometimes as much as twelve days after the landing of the importing vessel; that in some cases the dock from which the exporting vessels sail is as much as six or seven miles by land or water from the berth of the incoming vessel; that in all cases there elapses some time, of perhaps a day or more, and there is involved some carriage by land or water or both, and that such

lapse of time and necessity of carriage has subjected such liquors to pilferage, loss, and other unlawful disposition. (Rec. pp. 26–27.)

The answer further averred that both in cases of importation by water and by rail there have been heavy losses of intoxicating liquors destined for foreign countries, and that, on information and belief, such liquors were purloined or stolen and ultimately found their way into consumption for beverage purposes in the United States. (Rec. 27.)

Annexed to the answer as exhibits were schedules prepared by the collector of customs showing instances between July 1, 1919, and July 1, 1921, in which losses occurred in consignments of liquor being transshipped in New York between the time the goods were landed and the time of their arrival on the exporting vessel. (Rec. 27, 31–39.) Specific reference was made of the theft of a barge containing 174 drums of alcohol, of which only 29 drums were subsequently recovered. (Rec. 27.)

In addition, the answer averred that if plaintiff's contention is correct, then it follows as a corollary that any foreign vessel transporting liquor and bearing clearance papers from one foreign port to another may cruise at will in the territorial waters of the United States, rendering well-nigh impossible the already difficult task of preventing the smuggling of intoxicating liquor into the United States. (Rec. 29–30.) And in this connection the answer alleges, on information and belief, that a large and profitable business has been carried on by American citizens

with the object and result of importing liquor into the United States in violation of law; that the vessels employed by such persons are under British registry and sail out of a British port in the Bahama Islands with clearance papers for Halifax, another British port; that one such vessel is now under seizure in New York and that another recently was forced into the port of Philadelphia by stress of weather. (*Id.*)

The decision.

The case was heard by Circuit Judge Mayer, who dismissed the plaintiff's bill (Rec. 56–57), holding: (1) The national prohibition act taken literally absolutely prohibits the transportation which plaintiff finds necessary for its purposes; (2) the Congress had plenary power to prohibit the transportation of liquor for beverage purposes, even if intended for use outside of the United States; (3) the act provides a method by which intoxicating liquors for nonbeverage purposes may be transported, and the fact that the transshipment of liquors is not included in the means provided, indicates that Congress did not intend an exception; (4) that the act, in line with the amendment, expressly forbids the "exportation" of intoxicating liquors for beverage purposes; (5) the act in this particular amounts to a practical construction of the amendment to the effect that it absolutely destroys all traffic in intoxicating liquors for beverage purposes even though intended for use outside the United States; (6) Congress had the right to set up safeguards against the wrongful diversion of intoxi-

cating liquors; (7) section 3005 of the Revised Statutes is of doubtful application, since it is a revenue statute and exempts from customs duties merchandise which otherwise would be dutiable, whereas the shipments in question were not subject to duty, could not have been imported, and the subject has no relation to revenue; (8) while repeals by implication are not favored, where a later statute is plainly inconsistent with a prior one, the latter necessarily repeals the former; (9) section 3, Title II, of the Volstead Act and section 3005 of the Revised Statutes are inconsistent in terms, and to the extent that the latter has any bearing on the case, it must be deemed to have been repealed; (10) Presidents Cleveland and Harrison having held that the treaty of 1871 was abrogated, a court of first instance will not take a contrary view.

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS.

The applicable constitutional, statutory, and treaty provisions are as follows:

The eighteenth amendment:

> * * * the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.
>
> Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3 of Title II of the Volstead Act:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized by this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *. (Ch. 85, 41 Stat., pp. 308–309.)

Section 3005, Revised Statutes, as amended:

> All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the customhouse and conveyed, in transit, through the territory of the United States without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

Article XXIX of the treaty with Great Britain concluded May 8, 1871, and proclaimed July 4, 1871:

> It is agreed that, for the term of years mentioned in Article XXXIII, of this treaty, goods, wares, or merchandise arriving at the

ports of New York, Boston and Portland and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper customhouse, and conveyed in transit, without the payment of duties through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States. (Treaties, conventions, &c., vol. 1, pp. 711–712, Senate Doc. No. 357, 61st Cong., 2d sess.)

ASSIGNMENTS OF ERROR IN NO. 615.

The District Court erred:

1. In holding that the national prohibition act does not forbid the transportation of intoxicating liquor intended for beverage purposes, from Canada to a foreign country, by transshipment, in bond, through the United States.

2. In holding that the treaty between Great Britain and the United States proclaimed July 4, 1871, was not abrogated by the adoption of the eighteenth amendment to the Constitution and the passage of the national prohibition act so far as said treaty relates to liquors for beverage purposes.

3. In holding that said treaty was not abrogated and terminated by the executive branch of the United States prior to the adoption of the eighteenth amendment to the Constitution of the United States and the passage of the national prohibition act, so far as said treaty relates to the transshipment of merchandise from the British possessions to foreign countries and through the United States.

4. In holding that section 3005, Revised Statutes, was not repealed by the national prohibition act so far as said section pertains to intoxicating liquor for beverage purposes.

5. In holding that the national prohibition act and the regulations lawfully promulgated thereunder, permit the transportation of intoxicating liquor from Canada to a foreign country, by transshipment in bond, through the United States, under regulations pursuant to the treaty aforesaid and section 3005, Revised Statutes. (Printed in full, Rec. 28–31.)

ARGUMENT.

I.

THE EIGHTEENTH AMENDMENT AND THE NATIONAL PROHIBITION ACT APPLY TO AND PROHIBIT THE TRANSSHIPMENT [1] OF INTOXICATING LIQUORS FOR BEVERAGE PURPOSES IN OR THROUGH THE UNITED STATES.

1. *Such transshipments are within the very terms of the amendment and act.*—The eighteenth amendment and section 3 of Title II of the Volstead Act expressly prohibit the "transportation" of intoxicating liquors within, the "importation" thereof into, or the "exportation" thereof from, the United States for beverage purposes.

In addition, the Volstead Act provides that no person shall "deliver," "furnish," or "possess" any intoxicating liquor "except as authorized in the act." And further, that all provisions of the act "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The transshipment of intoxicating liquor in and through the United States necessarily involves "importing," "exporting," "possessing," "transporting," "furnishing," and "delivering" such liquor. The wording of the amendment and act, therefore, plainly includes transshipment of intoxicating liquors, as was conceded by counsel for Hiram Walker & Sons (Ltd.) in the District Court. (Rec. No. 615, p. 22.)

[1] For convenience the word "transshipment" will be used to designate both the transshipments at the port of New York involved in the *Anchor Line Case*, No. 639, and the transshipments and "in transit" conveyances involved in the *Walker Case*, No. 615.

Nowhere does the act expressly authorize such transshipment or "in transit" conveyance of liquor; therefore, under the very terms of the act they must be deemed to be prohibited.

2. *The plain object of the amendment and act was to destroy all traffic in or dealing with intoxicating liquors.*—Counsel for complainants argue that the amendment and statute have as their object the prohibiting of the *use* of intoxicating liquor in the United States, and that as the transshipment of liquor in and through the United States does not directly contribute to such use (a proposition which we do not admit), it is not within their scope or spirit.

While the ultimate object is the prevention of the *use* of intoxicating liquors, it is evident that the immediate purpose is the destruction of all traffic in or dealing with the interdicted commodities.

This follows from the language employed. Neither the eighteenth amendment nor the prohibition act in terms forbids the *use* of intoxicating liquors. As recently pointed out by Mr. Justice McReynolds, they are concerned merely with the incidents of ownership, such as the manufacture, sale, transportation possession, etc. *Street* v. *Lincoln Safe Deposit Co.*, 254 U. S. 88, 95.

The reason for this is that in dealing with a situation such as the liquor evil by constitutional amendment or legislation, a more effective method of eradicating it is by preventing the means by which it comes into being, than by direct inhibition on the use.

Had the eighteenth amendment and the Volstead Act provided simply an inhibition on the use or

consumption of intoxicating liquors, there might be room for the contention that such inhibition did not extend to the possession or transportation of liquor not intended for beverage use in the United States. But such was not the language employed.

The truth of the matter is that both the amendment and the statute have for their immediate purpose the suppression of all traffic in or dealing with intoxicating liquor within the United States. The ultimate object of such suppression is, of course, elimination of the use of intoxicants; but the amendment and the act are actually concerned with the means rather than the end.

3. *The amendment and the act clearly were intended to prohibit the possession or transportation of liquor for beverage purposes, whether for consumption within the United States or without.*—When the Volstead bill was under consideration in the Senate, there was added an amendment, now section 20, Title III, making it unlawful to import or introduce into the Canal Zone, or to manufacture, sell, transport, possess, etc., liquor within the Canal Zone. (58 Cong. Rec. 4895.) The amendment contained the following proviso:

> *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad. (41 Stat. 322.)

It is impossible to understand why this proviso was made to section 20, Title III, while no similar clause was added to section 3, Title II, if Congress

really intended to exempt from the latter the transshipment of liquors. The rule *expressio unius est exclusio alterius* applies.

Again, both the eighteenth amendment and the prohibition act expressly prohibit the *exportation* of intoxicating liquors *from* the United States. Such prohibition is inconsistent with an intention to restrict their application to liquors intended for consumption in the United States.

The conclusion of the District Court in No. 615 (Rec. 24–25) to the effect that this provision is without significance for the reason that "exportation" necessarily comprehends manufacture within the United States, in violation of law, robs the provision of all meaning and is untenable.

The manufacture of intoxicating liquors was expressly forbidden by the Volstead Act, and had been prohibited for some time prior thereto by war-time legislation. The provision in said act against exportation can not, therefore, be restricted to liquors manufactured in violation of law. The provision relates to *all* exportations of liquor, whatever the circumstances attending its manufacture.

At the time the Volstead Act was passed there was stored in bonded warehouses many millions of gallons of distilled spirits manufactured in this country strictly in accordance with law. (See opinion of this Court in *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, 158, *footnote*.) In spite of the urgent pleas of the owners, Congress, in passing the Vol-

stead Act, absolutely prohibited the exportation of this surplus.

This liquor was bonded, tagged, and labeled and could have been exported with no greater risk of loss than attends the "in transit" shipment of foreign liquor. But Congress forbade the exportation of this legally acquired liquor and it could have been led to that decision only through apprehension of the inevitable losses and diversions to unlawful usage attendant upon the transportation to seaboard.

It is hard to believe that Congress would prohibit American citizens from exporting valuable stocks of lawfully acquired liquor and at the same time allow aliens to flood the ports of the United States with liquor, and to transport large quantities thereof clear across the country, when the chances of loss by theft are no greater in the one case than in the other.

Or, assume two competing distillers on opposite sides of the Canadian border. Is it reasonable to suppose that Congress intended to say to the American distiller that his stock of lawfully acquired liquor must be kept in his warehouse and at the same time allow the Canadian distiller to transport his liquor at will past the American's door bound for Mexico and other foreign countries?

The inclusion in the amendment and the act of the ban on exportation conclusively points to the absolute prohibition of all transportation.

4. *The proceedings in Congress evidence the legislative intention to prohibit all possession and all transportation except as specifically authorized.*—The proceedings and debates attending the passage of the Volstead Act show that it was the earnest desire of a remarkably unanimous Congress to prohibit absolutely all methods of dealing with intoxicating liquors which experience had shown might lead to their diversion to beverage purposes.

Section 3 of Title II, being the omnibus section of the act, received special attention in both Houses of Congress. There was considerable opposition to the inclusion of the word "possess" in this section. For instance, Congressman Gard, of Ohio, in speaking of this section, said (58 Cong. Rec. 2449):

> When we considered this section we had the word "use" after the word "possess." The word "use" has been stricken out and the word "possess" should be stricken out. The words "furnish" and "receive" in my opinion should be stricken out unless this House intends to write a bill so drastic as to make it appear in the eyes of the people of the United States that there is nothing in it except a bill of absolute prohibition.

But the word "possess" was retained by the conference committee and its retention was thought of such importance that the Senate conferees in their report (S. Rep. 151) justified it at considerable length:

> The committee in the House struck out the word "use" after "possess" and retained the

> word "possess" for good reasons. * * * These provisions are of the greatest importance to the officer who wants to enforce the law. They are based on experience in the States. If individuals are permitted to possess intoxicating liquor for beverage purposes outside the home, officers of the law are constantly embarrassed in their efforts to enforce the law. It is always a question whether the individual has the liquor legally or otherwise. * * * The strongest weapon that Congress can put into the hands of faithful law-enforcement officials will be a provision in this enforcement code to prohibit the possession of intoxicating liquor for beverage purposes, *except as specifically provided for in the act.* [Italics ours.]

In order to strengthen this provision against the "possession" of intoxicating liquor, section 33, Title II, was placed in the law, making possession "prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title" (41 Stat. 317).

The transshipment or "in transit" conveyance of intoxicating liquor necessarily involves the "possession" of such liquor as well as its "transportation." As shown by the opinion of District Judge Tuttle, this was conceded by opposing counsel in the Walker case in the court below (Rec. No. 615, p. 22; 275 Fed. 373, 376):

> It is clear enough, and is, I understand, conceded by the plaintiff, that under a strict

> construction of the language of the statute, the latter is sufficiently broad in its terms to prohibit the shipments under consideration, since it is undoubtedly necessary, in order to make such shipments, to both "possess" and "transport" intoxicating liquor within the United States.

As regards the word "transportation," it was practically the unanimous opinion of both Houses that all transportation of intoxicating liquors should be prohibited except in such cases as might be specially provided for. An examination of the debates discloses no instance of anyone questioning the inclusion of this word.

It is noteworthy that all of the amendments proposed for the evident purpose of weakening the law, while they omitted other provisions contained in the bill as passed, invariably included the prohibition against transportation. Thus, Congressman Igoe, leader of the opposition, moved that the bill be amended by striking out all after the enacting clause and that there be substituted a provision for punishing by fine of $500 or imprisonment for one year "anyone who shall knowingly manufacture, sell, or *transport* within the United States, or import into the United States, or export from the United States, any intoxicating liquor." (58 Cong. Rec. 2976.) This persuasively indicates that it was the unanimous view of Congress that all transportation of liquor should be banned.

The legislative intent further appears from the provisions of sections 13 to 16 of Title II which subject carriers to the most stringent regulations in respect of the transportation of liquor under the permissive sections of the act. It seems incredible that the Congress which made such rigid provisions against evasion of the law through permissive transportation would have left without restrictions imposed in the act the great business of transshipping liquor at the ports of the United States and the conveying of it through the United States.

5. *The language of the amendment and act being plain, resort may not be had to construction to read out what is clearly included.*—The recent decisions of this court are unanimous to the effect that where the language of a statute is plain and unambiguous, it can not be divested of its obvious meaning by resort to construction. *Hamilton* v. *Rathbone,* 175 U. S. 414, 421; *United States* v. *Lexington Mill &c. Co.,* 232 U. S. 399, 409–10; *Adams Express Co.* v. *Kentucky,* 238 U. S. 190, 199; *Caminetti* v. *United States,* 242 U. S. 470, 485; *Thompson* v. *United States,* 246 U. S. 547, 551.

In *Thompson* v. *United States, supra,* the court said:

> The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.

And in *Caminetti* v. *United States, supra,* an extreme case, the court characterized the rules as "elementary," saying:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. * * *
>
> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

The case of *Holy Trinity Church* v. *United States,* 143 U. S. 457, and other cases relied on by plaintiffs, to the effect that under certain conditions courts will look beyond the letter of a statute to give effect to the obvious spirit and intent, have no application. In the *Holy Trinity case* this court held that the alien contract labor law did not apply to a contract between the Rev. E. Walpole Warren, an Englishman, and the Church of the Holy Trinity, a religious society incorporated under the laws of a State, whereby the former engaged to remove to the United States and enter into the service of the latter as rector. The conclusion was obvious and irresistible, and the case has gained prominence mainly because of the learned opinion by Mr. Justice Brewer. In that case, and in the others cited, the results which would follow from giving literal effect to the statutes involved

would have been absurd, bordering on grotesque. Indeed, the cases are scarcely less far-fetched than the historic instances from Puffendorf and Plowden, cited by Mr. Justice Brewer.

Neither have the cases of *United States* v. *Gudger*, 249 U. S. 373, and *Street* v. *Lincoln Safe Deposit Company*, 254 U. S. 88, any bearing. The former arose under the Reed amendment (act of March 3, 1917, 39 Stat. 1058, 1069), making unlawful the transportation of liquor "into any State or Territory the laws of which * * * prohibit the manufacture," etc., of liquor. The defendant was a passenger on a railroad train bound from Baltimore, Md., to Asheville, N. C., traveling on a through ticket. While the train was temporarily stopped at Lynchburg, Va., he was arrested, his baggage examined, and whiskey found. Although he had no intention of leaving the train at Lynchburg or elsewhere in Virginia, he was indicted for transporting liquor "into" Virginia in violation of law. This court affirmed the judgment of the District Court in quashing the indictment, saying (pp. 374–375):

> * * * we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce "into any State or Territory the laws of which State or Territory prohibit the manufacture," etc., includes the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add

cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it, since the context makes clear that the word "into," as used in the statute, refers to the State of destination, and not to the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped.

The Reed amendment, unlike the national prohibition act, did not prohibit transportation generally, but only transportation *into* a particular territory, and the court simply gave effect to the plain wording of the statute. The principle applied is the one contended for herein, and if applied in the instant cases will inevitably result in a holding that the shipments in question are violative of the prohibition law.

In *Street* v. *Lincoln Safe Deposit Co.* the owner of liquors lawfully acquired for personal consumption had stored them in a warehouse where, as alleged and admitted, they were in his "exclusive possession and control." Section 33 of the Volstead Act expressly authorizes the possession of liquors lawfully acquired in one's private dwelling house for personal consumption. The court held (1) that the warehouse keeper might permit such storage of liquors to continue after the effective date of the prohibition act; (2) that the warehouse owner did not unlawfully "possess" the liquors in violation of section 3 of Title II; and (3) that the act did not prohibit the transportation of the liquors from the warehouse to

the home of the owner, under permit from the Bureau of Internal Revenue.

The ground of decision, as explained in the later case of *Corneli* v. *Moore* (No. 174), decided January 30, 1922, was that by the admissions of the pleadings the liquor in question was "in the exclusive possession and control" of the owner, and the storage room "was obviously the use of a convenience very commonly employed and contributory to his dwelling." The court merely gave preference to a liberal interpretation of one of the permissive provisions of the act over a construction which would have resulted in the confiscation of liquors lawfully acquired. The difference between such a situation and that involved in the instant cases, where no permissive section is involved, is indicated by the following excerpt from the opinion (p. 93):

> That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of *the many provisions of the act inconsistent with a construction which would render such removal unlawful* * * *. (Italics ours.)

It is clear that this case has no bearing on the cases at bar; and it has been so narrowed and restricted in the later case of *Corneli* v. *Moore* as to have no application beyond its peculiar facts.

6. *The prohibition on transshipments will not be read out of the act on the ground that as applied to such*

transshipments it has extraterritorial effect.—It is argued that the national prohibition act if construed to forbid the transshipment in the United States of liquor in course of transportation from one country to another will give the act an extraterritorial effect, in that it will operate not merely to prevent the use of liquors in the United States but will extend its effect beyond the territorial limits of the United States, and that, as Congress can not be presumed to have intended such result, the law should not be so construed.

Unlike *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, cited by the plaintiff in No. 615, there is involved in the present cases no attempt to apply the laws of the United States to acts committed in a foreign country. The thing prohibited is the possession or transportation of intoxicating liquor "within the United States."

A like contention was rejected by this court in *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348. The statute there under consideration was section 4 of the seaman's act of March 4, 1915, ch. 153, 38 Stat. 1164, providing (1) that every seaman on a vessel of the United States shall be entitled to receive on demand from the master one-half of the wages which he shall then have earned, at every port where such vessel, after voyage has been commenced, shall load or deliver cargo before the voyage is ended; (2) that all stipulations in the contract of employment to the contrary shall be void; and (3) that the section shall

apply to seamen on foreign vessels while in harbors of the United States.

It was contended that the provision must be confined either (1) to American seamen or (2) to foreign seamen serving under contracts entered into in ports of the United States, since otherwise it would have the effect to invalidate contracts of employment entered into in foreign countries and valid where made, and would in effect amount to an attempt to regulate the making of such contracts outside the territorial limits of the United States. This court replied that the act merely regulated the relation of master and servant while a foreign vessel was in American harbors; that submission to such regulations was a condition precedent to the right to enter our ports, and that the imposition of such condition was within the constitutional authority of Congress.

The reasoning of the opinion is plainly applicable to the cases at bar.

II.

THE NATIONAL PROHIBITION ACT IN ITS APPLICATION TO THE TRANSSHIPMENT OF INTOXICATING LIQUOR FOR BEVERAGE PURPOSES IS CONSTITUTIONAL AND VALID

1. *Fallacy of plaintiffs' contention.*—The above proposition appears to have been conceded by counsel in the *Walker Case* in the District Court (Rec. No. 615, p. 22); and although contested in the *Anchor Line Case* the point was not accorded serious attention (Rec. No. 639, pp. 50–56).

The argument appears to run: (1) That the purpose of the eighteenth amendment is to prohibit

the manufacture, sale, transportation, etc., of intoxicating liquor for beverage purposes *within the United States;* (2) that the prohibition act if construed to apply to the transshipment of liquor in and through the United States will prohibit the transportation and possession of liquor for beverage purposes *outside the United States;* (3) wherefore, the act is broader than the amendment and beyond the power of Congress to enact.

The fallacy of this argument, as well as of complainants' argument in reference to the construction of the act, consists in limiting the operation and effect of the eighteenth amendment to a purpose not expressed therein. As we have seen (*supra* p. 12), the eighteenth amendment prohibits absolutely the transportation of intoxicating liquors (1) "within the United States," (2) "for beverage purposes." This juxtaposition demonstrates that the words "within the United States" define the place where the forbidden act may not take place, and that they do not relate to or qualify the words "for beverage purposes."

But accepting, *arguendo*, the premise, the conclusion does not follow, because—

2. *Congress in legislating for the enforcement of the eighteenth amendment may provide all means reasonably necessary effectively to suppress the prohibited acts.*—It is the settled doctrine of this court (1) that Congress in legislating within its constitutional sphere for the suppression of a particular evil may provide all means reasonably necessary to effectuate

the legislative will; and (2) that where the means provided has some reasonable relation to the evil at which the legislation is aimed the court will not substitute its judgment for that of Congress as to the necessity or advisability of the means.

This proposition is sustained by a principle of constitutional construction announced in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423, and ever since adhered to. The principle was thus stated in *Powell* v. *Pennsylvania*, 127 U. S. 678, 685:

> The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the Government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself"; yet "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment. . . ."

Applying the principle to that case it was held that the courts would not override the legislative judgment that the protection of the public health

required not merely that the manufacture of oleomargarine be so regulated as to exclude noxious ingredients, but prohibited altogether; that the legislature had this choice of means.

In *Otis* v. *Parker*, 187 U. S. 606, 608, 609, it was held that in order to suppress gambling in corporate stocks the legislature may avoid all contracts for the sale of such stocks on margin, whether only a settlement of price differences or a *bona fide* acquisition of the stock is contemplated.

Similarly in *Public Clearing House* v. *Coyne*, 194 U. S. 497, it was held that in preventing the use of the postal service in aid of lotteries and fraudulent enterprises Congress is not confined to excluding matter relating to such enterprises but may prohibit the transmission or delivery of all matter sent by or addressed to persons participating therein.

A leading case on the subject is *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, in which it was held that a State legislature, in order to make effective its prohibition of the use of malt liquor might include within the prohibition wholly innocuous beverages. Mr. Justice Hughes, speaking for the court, said (p. 201):

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary to make its action effective. It does not follow that because a

> transaction separately considered is innocuous it may not be regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

That case was followed in *Ruppert* v. *Caffey*, 251 U. S. 264, in upholding the power of Congress, under the war power, to prohibit the manufacture of all malt or vinous liquors containing as much as one-half of one per centum of alcohol by volume, even though they be not in fact intoxicating.[1]

In view of the instances cited, who will say that the prohibition of the possession or transportation within the United States of liquors for beverage purposes, even though intended for consumption outside the United States, has no reasonable relation to the prevention of the use of such liquors within the United States?

3. *Because of their noxious qualities all traffic in or dealing with intoxicating liquor may be absolutely suppressed.*—It can not be supposed that the power conferred by the eighteenth amendment on Congress and the States to suppress the use of intoxicating liquors is not as great as the power theretofore possessed by the States to legislate on the subject. Therefore, the many cases upholding the very drastic prohibition laws of the States are in point. It will suffice to quote from only one of these, *Crane* v. *Campbell*, 245 U. S. 304, 307–308, in which this

[1] See, also, *The Slaughter House Cases*, 16 Wall. 36; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Booth* v. *Illinois*, 184 U. S. 425; *Silz* v. *Hesterberg*, 211 U. S. 31; *Delaware, Lack. & West. R. R. Co.* v. *United States*, 231 U. S. 363, 370; *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479; *Brougham* v. *Blanton*, 249 U. S. 495.

court upheld a statute of the State of Idaho punishing the possession of intoxicating liquor for personal use:

> It must now be regarded as settled that on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the fourteenth amendment. * * *
>
> As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of the power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.
>
> We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible way of getting at them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.

III.

PLAINTIFFS HAVE NOT BY PROPER ALLEGATIONS BROUGHT THEMSELVES WITHIN ARTICLE XXIX OF THE TREATY WITH GREAT BRITAIN PROCLAIMED JULY 4, 1871; BUT IN ANY EVENT SAID ARTICLE HAS BEEN ABROGATED.

1. *Neither plaintiff has alleged facts bringing it within Article XXIX.*—Said article, as we have seen (*supra*, p. 13), provides that—

> goods, wares, and merchandise arriving at *the ports of New York, Boston, and Portland and any other ports of the United States which have been or may, from time to time be specially designated by the President* of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper customhouse, and *conveyed in transit*, without the payment of duties, *through the territory of the United States;*—

and that in like manner—

> goods, wares, and merchandise may be *conveyed in transit*, without the payment of duties, from such possessions *through the territory of the United States for export from the said ports* of the United States. [Italics ours.]

In No. 615 Hiram Walker & Sons (Ltd.), alleges interference with two shipments, viz, one from Walkersville, Ontario, to the port of Detroit, and thence through the territory of the United States to customers in Mexico, and another from Walkersville to Detroit and from Detroit to New Orleans for export to Guatemala. Yet nowhere in its petition does the plaintiff allege that the ports at which the shipments

were to be exported were "specially designated by the President of the United States" in accordance with the provisions of the article.

Again, it is clear that the language of the article, providing that goods, wares, and merchandise may "be conveyed in transit" "through the territory of the United States," relates to the transportation of such goods from one port to another and not merely to transshipments in a single port as alleged by the Anchor Line in No. 639.

It is submitted, therefore, that neither plaintiff has set up any rights under the treaty.

2. *The abrogation of Article XXIX was effected by Act of Congress.*—Article XXIX as we have seen provides that it shall be in effect for the term of years mentioned in Article XXXIII (*supra*, p. 13).

Article XXXIII, reads as follows:

> The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting

> parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

Articles I to XVII, inclusive, provide for the settlement of the Alabama claims and for claims of British subjects against the United States; Articles XVIII to XXV, inclusive, and Article XXX relate to fisheries; Articles XXIX and XXXIII have been set out above and the remaining articles cover miscellaneous matters such as the use of waterways, arbitration of boundaries, etc.

On March 1, 1873, Congress passed an act entitled, "An act to carry into effect the provisions of the treaty between the United States and Great Britain signed in the city of Washington the eighth day of May, eighteen hundred and seventy-one, relating to fisheries."

Section 3 of this act, giving effect to Article XXIX of the treaty, is as follows:

> That from the date of the President's proclamation authorized by the first section of this act, *and so long as the articles eighteenth to twenty-fifth, inclusive, and articles thirtieth of of said treaty, shall remain in force, according to the terms and conditions of article thirty-third of said treaty*, all goods, wares or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been, or may, from time to time, be, specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in

> North America, may be entered at the proper customhouse and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Secretary of the Treasury may, from time to time, prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise, may be conveyed in transit, without the payment of duties, from such possessions, through the territory of the United States, for export from the said ports of the United States. (17 Stat. 482.) [Italics ours.]

This section was incorporated in the Revised Statutes as section number 2866.

On March 3, 1883, Congress passed a joint resolution entitled, "Joint resolution providing for the termination of articles Numbered XVIII to XXV, inclusive, and Article Numbered XXX of the treaty between the United States of America and Her Britannic Majesty concluded at Washington May 8, 1871. (22 Stat. 641.)

The resolution provided for the giving of notice of the abrogation of the articles of the treaty named in the title, and no others. Section 3 contained the following provision:

> And the act of Congress approved March 1, A. D. 1873, entitled * * * so far as it relates to the articles of said treaty so to be terminated, shall be and stand repealed and be of no force on and after the time of the expiration of said two years.

By proclamation of January 21, 1885, President Arthur gave notice that Articles XVIII to XXV, inclusive, and Articles XXX and XXXII will expire on July 1, 1885. (23 Stat. 841.)

As noted, the act of March 1, 1873, giving effect to the various provisions of the treaty, limits the operation of Article XXIX to the life of Articles XVIII to XXV and Article XXX, and constitutes a legislative interpretation of Article XXXIII as it relates to Article XXIX; if not this, it is a legislative limitation of the article which governs.

Section 3 of the act of 1873, giving effect to Article XXIX (Section 2866, R. S.), expired by self-limitation on the abrogation of Articles XVIII to XXV and XXX, and there is, therefore, no legislation in force to give effect to this Article.[1] The observations of this court in *Foster* v. *Neilson*, 2 Pet. 253, 314, are pertinent:

> * * * Our Constitution declares a treaty to be the law of the land; it is, consequently, to be regarded by courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.

3. *Presidents Cleveland and Harrison have declared Article XXIX terminated.*—President Cleveland, in

[1] See editorial note, Compiled Statutes, 1916, vol. 6, page 6667.

a message to Congress dated August 23, 1888, requesting legislative action conferring upon the Executive power to suspend by proclamation the operation of all laws and regulations permitting the transit of goods, wares, and merchandise in bond across or over the territory of the United States to or from Canada, as a retaliatory measure against grievances suffered by Americans at the hands of British subjects in Canada, reviewed the provisions of the treaty and legislation as to Article XXIX, and stated his opinion that this article terminated the 1st day of July, 1885.

The President said:

> I am of opinion that the "term of years mentioned in Article XXXIII," referred to in Article XXIX as the limit of its duration, means the period during which Articles XVIII to XXV, inclusive, and Article XXX, commonly called the "fishery articles," should continue in force under the language of said Article XXXIII.
>
> That the joint high commissioners who negotiated the treaty so understood and intended the phrase is certain, for in a statement containing an account of their negotiations, prepared under their supervision and approved by them, we find the following entry on the subject:
>
> "The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force."
>
> In addition to this very satisfactory evidence supporting this construction of the

language of Article XXIX it will be found that the law passed by Congress to carry the treaty into effect furnishes conclusive proof as to the correctness of such construction.

This law was passed March 1, 1873, and is entitled "An act to carry into effect the provisions of the treaty between the United States and Great Britain signed in the city of Washington the 8th day of May, 1871, relating to the fisheries." After providing in its first and second sections for putting in operation Articles XVIII to XXV, inclusive, and Article XXX of the treaty, the third section is devoted to Article XXIX, as follows: "Sec. 3. That from the date of the President's proclamation authorized by the first section of this act, and so long as the articles eighteenth to twenty-fifth, inclusive, and article thirtieth of said treaty shall remain in force according to the terms and conditions of article thirty-third of said treaty, all goods, wares, and merchandise, arriving," etc., etc., following in the remainder of the section the precise words of the stipulation on the part of the United States as contained in Article XXIX, which I have already fully quoted.

Here, then, is a distinct enactment of the Congress limiting the duration of this article of the treaty to the time that Articles XVIII to XXV, inclusive, and Article XXX should continue in force. That in fixing such limitation it but gave the meaning of the treaty itself is indicated by the fact that its purpose is declared to be to carry into effect the provisions of the treaty, and by the further fact that this

law appears to have been submitted before the the promulgation of the treaty to certain members of the joint high commission representing both countries, and met with no objection or dissent.

After considering the effect of the act of March 1, 1873, the President continued:

> There appearing to be no conflict or inconsistency between the treaty and the act of Congress last cited, it is not necessary to invoke the well-settled principle that in case of such conflict the statute governs the question.
>
> In any event, whether the law of 1873 construes the treaty or governs it, section 29 of such treaty, I have no doubt, terminated with the proceedings taken by our Government to terminate Articles XVIII to XXV, inclusive, and Article XXX of the treaty.
>
> * * * * *
>
> If by any language used in the joint resolution it was intended to relieve section 3 of the act of 1873, embodying Article XXIX of the treaty from its own limitations, or to save the article itself, I am entirely satisfied that the intention miscarried. (Messages and Papers of Presidents, Richardson, vol. 8, pp. 620, 624, 625.)

President Harrison, in a message to Congress under date of February 2, 1893, in response to a resolution of the House requesting information as to regulations concerning the transportation of imported merchandise in bond, etc., took the same view as to Article XXIX as his predecessor.

After reviewing the provisions of the treaty, and the legislation under it, and quoting from the message of President Cleveland, cited above, President Harrison said:

> Section 3 of the law of 1873, which I have quoted, however, contains a legislative construction of Article XXIX of the treaty in the limitation that the provisions therein contained as to the transit of goods could continue in force only so long as Articles XVIII to XXV, inclusive, and XXX of the treaty should remain in force.
>
> * * * * * * * * The enactment of section 3 of the act of 1873 was a clear declaration that legislation was necessary to put Article XXIX of the treaty in operation, and that under the treaty our obligation to provide such legislation terminated whenever Articles XVIII to XXV and XXX should be abrogated. The legislation was accepted by Great Britain as a compliance with our obligations under the treaty. No objection was made that our statute treated Article XXIX as having force only so long as the other articles named were in force.

President Harrison then considered the opinions which had been expressed by Secretary Bayard and Senator Edmunds to the effect that Article XXIX was still in force and disposed of them as follows:

> An examination of the debates at the time of the passage of this joint resolution (Mar. 3, 1883, supra, p. 39) very clearly shows that Congress made an attempt to save Article

XXIX of the treaty and section 3 of the act of 1873. In the Senate on the 21st of February, 1883, the resolution being under consideration, several Senators, including Mr. Edmunds, the chairman of the Judiciary Committee, expressed the opinion that Article XXIX would not be affected by the abrogation of Articles XVIII to XXV and XXX, and an amendment was made to the resolution with a view to leave section 3 of the act of 1873 in force. The same view was taken in the debates in the House.

The subject again came before Congress in connection with the consideration of a bill (S. 3173) to "authorize the President of the United States to protect and defend the rights of American fishing vessels, American fishermen, American trading and other vessels in certain cases, and for other purposes."

In the course of the debate upon the bill in the Senate January 24, 1887, and in the House February 23 following, the prevailing opinion was, though not without some dissent, that Article XXIX was still in force.

On the 6th of July, 1887, in response to an inquiry by the Secretary of the Treasury, Mr. Bayard wrote a letter, a copy of which accompanies this message, in which he expresses the opinion that Article XXIX of the treaty was unaffected by the abrogation of the fisheries articles and was still in force. In August, 1888, however, Mr. Cleveland, in a message to Congress, expresses his opinion of the question in the following language:

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(Quoting the language set forth on p. 43, supra.)

* * * * *

I am inclined to think that, using the aids which the protocol and the nearly contemporaneous legislation by Congress in the act of 1873 furnish in construing the treaty, the better opinion is that Article XXIX in the treaty is no longer operative. The enactment of section 3 of the act of 1873 was a clear declaration that legislation was necessary to put Article XXIX of the treaty into operation, and that under the treaty our obligation to provide such legislation terminated whenever Articles XVIII to XXV and XXX should be abrogated. This legislation was accepted by Great Britain as a compliance with our obligations under the treaty. No objection was made that our statute treated Article XXIX as having force only so long as the other articles named were in force.

The conclusions of the President, so far as they relate to the subject now under consideration, were as follows:

First. That Article XXIX of the treaty of Washington has been abrogated.

Second. That even if this article were in force there is no law in force to execute it. (Messages and Papers of the Presidents, Richardson, vol. 9, p. 335, 339, 340, 345.)

The President transmitted with his message to Congress an opinion of Attorney General Miller also holding that Article XXIX was abrogated. (Opinions of the Attorney General, vol. 20, p. 388.)

As regards the suggestion that the Treasury Department has treated Article XXIX as still in force after these expressions of the Presidents, we reply: The Article is not self-executing but is dependent on enabling legislation. The Treasury Department, therefore, can have no concern with the Article but only with legislation passed to carry it into effect. As we have seen, Section 3 of the Act of March 1, 1873, giving effect to Article XXIX, is no longer in force. However, Section 3005, R. S., providing for "in transit" shipments, has been continuously on the books since before the negotiation of the treaty. A possible explanation is that existing Treasury Regulations, erroneously supposed to be based on the treaty, are in reality based on this independent legislation.

4. *The question being essentially political and not judicial, the legislative and executive interpretations should be followed.*—In *Taylor* v. *Morton*, 2 Curtis, 454, Mr. Justice Curtis, on circuit, said:

> Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, ro to act in direct contravention of such promise? I apprehend not.

In *Foster* v. *Neilson*, 2 Pet., 253, at page 306, Chief Justice Marshall said:

> The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the Nation have established. If the course of the Nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

In *Barker* v. *Harvey*, 181 U. S. 481, 488, Mr. Justice Brewer said:

> This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States as a sovereign power chooses to disregard.

In *Thomas* v. *Gay*, 169 U. S. 264, 271, Mr. Justice Shiras said:

> It is well settled that an act of Congress supersedes a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the Government.

And see also: *Head Money Cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *Chinese Exclusion*

Cases, 130 U. S. 581; *Botelier* v. *Dominguez*, 130 U. S. 238; *United States* v. *Lee Yen Tai*, 185 U. S. 213.

5. *If Article XXIX was not abrogated in the manner described, then so far as it relates to shipments of liquor it was abrogated by the national prohibition act.*—The conflict between Article XXIX of the treaty, as applied to the shipment of intoxicating liquor for beverage purposes, and section 3, Title II, of the national prohibition act, is plain and irreconcilable.

(A) As applied to such shipments Article XXIX provides, in effect, that intoxicating liquor for beverage purposes may be conveyed in transit through the United States to or from English possessions in North America; whereas

(B) Section 3, Title II, of the Volstead Act provides that "no person shall * * * manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized by this act."

It is, of course, well settled that in all cases of conflict between a treaty and a subsequent act of Congress, the latter will control. *Rainey* v. *United States*, 232 U. S. 310; *Sanchez* v. *United States*, 216 U. S. 167; *Barker* v. *Harvey*, 181 U. S. 481; *Ward* v. *Race Horse*, 163 U. S. 504; *Lenn Moon Sing* v. *United States*, 158 U. S. 538; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Horner* v. *United States*, 143 U. S. 570; *Botelier* v. *Dominguez*, 130 U. S. 238; *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Whitney* v. *Robertson*, 124 U. S. 190.

It follows, therefore, that Article XXIX, even if in force at the time the Volstead Act went into effect, was necessarily repealed by the latter in so far as it applied to the possession and transportation of liquor.

IV.

SECTION 3005 OF THE REVISED STATUTES CONFERRED NO AFFIRMATIVE RIGHTS WITH RESPECT TO THE TRANSSHIPMENT OF MERCHANDISE: ASSUMING THAT IT DID, IT WAS SUPERSEDED BY THE NATIONAL PROHIBITION ACT SO FAR AS SHIPMENTS OF LIQUOR ARE CONCERNED.

1. *Section 3005 conferred no affirmative rights.*—This provision was originally enacted as section 5 of the act approved July 28, 1866 (c. 298, 14 Stat. 328). That act was entitled "An act to protect the revenue, and for other purposes," and was purely a revenue measure. It provided, among other things, the customs duties to be collected on importations of cigars, cigarettes, distilled spirits, cotton, salt, etc., and contained several measures for the protection of the revenue. Section 5 read as follows:

> That from and after the passage of this act, all goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, or any other port of the United States which may be specially designated by the Secretary of the Treasury, and destined for places in the adjacent British Provinces, or arriving at the port of Point Isabel, Texas, or any other port of the United States which may be specially designated by the Secretary of the Treasury, and destined for places in the Republic of Mexico, may be entered at the customhouse, and conveyed, in transit, through

> the territory of the United States, without the payment of duties, under such rules, regulations, and conditions for the protection of the revenue as the Secretary of the Treasury may prescribe.

The provision was carried into the Revised Statutes in substantially the same language. By act of February 27, 1877 (c. 69, 19 Stat. 240), entitled "An act to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia," section 3005, R. S., was amended by striking out the words "Point Isabel" and inserting the word "Brownsville." By act of May 21, 1900 (c. 487, 31 Stat. 181), entitled "An act to amend section three thousand and five of the Revised Statutes of the United States," the provision was amended to its present form, viz:

> All merchandise arriving at any port of the United States destined for any foreign country may be entered at the customhouse, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

The reason for the last amendment is stated in the report of the Committee on Ways and Means of the House of Representatives, as follows:

> The changing conditions of commerce and the establishment of new transportation routes demand the enlargement of the privileges

> given by this statute to all foreign merchandise arriving for transit through the United States, whether to or from Canada, Mexico, or any other foreign country. The proposed change will tend to facilitate the carriage of foreign merchandise in bond through the United States by our own transportation companies, and will not in any way endanger the revenues * * *.
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> This section, as it now stands, provides only for the carrying and transit of merchandise from foreign countries destined to either some place in Canada or in Mexico. At the time the section was passed (July 28, 1866) this answered all the requirements of commerce. Since that time a large trade has grown up with oriental countries, much of which seeks transportation through the United States.
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> We are losing much of the benefit of this transportation because we can not pass these goods through the country in bond. This amendment is offered in order to give a fair share of this trade to our transportation. * * * (33 Cong. Rec. 1736.)

Clearly, therefore, section 3005, R. S., is purely a revenue measure enacted in the interest of American transportation companies and confers no affirmative right to transport merchandise into and through the United States. It merely exempts from payment of customs duties shipments into and through the United States which, under the tariff laws, would otherwise be dutiable as imports.

Title XXXIV of the Revised Statutes, in which section 3005 is contained, is entitled "Collection of Duties upon Imports." Section 2766, R. S., a part of the same title, provides:

> The word "merchandise," as used in this title, may include goods, wares, and chattels of every description *capable of being imported*. (Italics ours.)

Therefore, section 3005 has no possible application to the present cases, since intoxicating liquor may not be imported into the United States and is not "goods," "wares," or "merchandise" within the meaning of that section and is not subject to duty. On this point Judge Mayer said:

> In the cases at bar, the liquor was not subject to duty. It could not be imported. The introduction into this country from some foreign port of liquor for beverage purposes has no relation to revenues. Such liquor could not be lawfully introduced into this country because of the change in the national policy. (Rec. No. 639, p. 55.)

2. *Assuming that the section did confer the right claimed, it was repealed by the national prohibition act so far as shipments of liquor are concerned.*—It is true that repeals by implication are not favored, but it is further true that when a later statute is clearly inconsistent with a prior one, the latter must be deemed to have been repealed to the extent of such inconsistency. That section 3005, R. S., and section 3, Title II, of the national prohibition act are hopelessly antagonistic as regards the transportation of

liquor will appear from a brief comparison of their respective provisions:

Section 3005 R. S.

All merchandise arriving at any port of the United States destined for any foreign country *may be* entered at the customhouse, and *conveyed* in transit *through the territory of the United States* without the payment of duties under such regulations as to examination and *transportation* as the Secretary of the Treasury may prescribe.

Section 3, Title II, of the national prohibition act.

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, *transport, import, export,* deliver, furnish, or *possess any intoxicating liquor* except as authorized in this act. * * *

Ascribing to section 3005, R. S., the effect contended for by opposing counsel, viz, that it conferred an affirmative right to transport merchandise through the United States, we have the following situation: The old law, as it applies to intoxicating liquors, says that they may be "conveyed" under regulations governing "transportation"; while the new law absolutely prohibits such "transportation" and even "possession." It is difficult to conceive of two more flatly contradictory provisions.

3. *The prohibition act supersedes all licensing and permissive statutes.*—The eighteenth amendment and the Volstead Act being absolute prohibitions on the manufacture, sale, transportation, etc., of intoxicating liquor, it is not within the power of Congress to license or permit the doing of any of those acts, and all licensing and permissive statutes in force on the effective date of the amendment and act were by

necessary implication repealed. In the *National Prohibition cases* (253 U. S. 350, 386–387) this court laid down the following propositions:

> 6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a State legislature, or by a Territorial assembly—which authorizes or sanctions what the section prohibits.
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> 7. The second section of the amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

In *United States* v. *Yuginovich* (No. 523) decided June 1, 1921, this court had before it an indictment in four counts, based on the revenue provisions of the Revised Statutes and charging (*a*) defrauding the United States of the tax on distilled spirits; (*b*) failing to display in a distillery the words "Registered distillery"; (*c*) operating a distillery without giving the required bond; (*d*) making mash fit for distillation in a building not a registered distillery. The acts charged having been committed after the effective date of the eighteenth amendment and the Volstead Act, a demurrer and a motion to quash were filed on

the ground that the statutes under which the indictment was found had been repealed.

This court in affirming the action of the District Court in quashing the indictment, said:

> *These statutes have long been part of the Federal internal revenue legislation*, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. *At the time of their enactment it was legal, so far as the Federal Government was concerned, to manufacture and sell ardent spirits for beverage purposes.* The Government derived large revnue from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. *This policy was radically changed by the adoption of the eighteenth amendment to the Federal Constitution, and the enactment of legislation to make the amendment effective.* The eighteenth amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act (41 Stat. 305). It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes.
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> Section 35 in its first sentence repeals all prior acts to the extent of their inconsistency

with the national prohibition act, to that extent and no more.

* * * * *

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. (*United States* v. *Tynen*, 11 Wall. 88.) In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty. The concluding phrase of section 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the eighteenth amendment and in view of the provisions of the Volstead Act intended to make that amendment effective.

Having in mind these principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the Government of the revenue tax, we do not believe that the general language used at the close of section 35 evidences the intention of Congress to inflict for such an offense the punishment provided in section 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under section 35 enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. *Moreover, the con-*

cluding words of the first paragraph of section 35, as to all the offenses charged, must be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquor for beverage purposes, or property designed for the manufacture of such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision for punishment made in the Volstead Act.

We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words: "Registered distillery" in a place which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law. [Italics ours.]

See also *United States* v. *Two Thousand Cases of Whiskey*, 277 Fed. 410; *United States* v. *Stafoff*, 268 Fed. 417; *Ex parte Crookshank*, 269 Fed. 980.

There is nothing in *Vigliotti* v. *Pennsylvania*, No. 530, decided April 10, 1922, inconsistent with this proposition. In that case the court, in accordance with the general rule, followed the Pennsylvania

courts' construction of the State statute as being a prohibitory and not a licensing measure, and held that, *as so construed*, it constituted "appropriate legislation" for the enforcement of the eighteenth amendment.

4. *The transshipments involved in case No. 639 are not within the section.*—Appellant Anchor Line has asserted rights under section 3005, R. S. (Rec. 15, 19, 20), but it is clear that the facts alleged do not bring appellant within that section. The section in terms provides that merchandise arriving at any port of the United States may be "*conveyed*," "*in transit*," "*through the territory of the United States*," without the payment of duties, etc. The object of the section was to permit such in transit shipments for the benefit of American transportation companies (supra, p. 51). It clearly does not apply to the mere transshipment of merchandise from one ship to another in a single port (compare 27 Op. A. G. 440).

CONCLUSION.

It is respectfully submitted that the decree in No. 615 should be reversed and the cause remanded with instructions to dismiss the bill, and that the decree in No. 639 should be affirmed.

GUY D. GOFF,
Assistant to the Attorney General.

ABRAM F. MYERS,
Special Assistant to the Attorney General.

APRIL 17, 1922.

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IN THE SUPREME COURT OF THE UNITED STATES.

JOHN A. GROGAN, Collector of Internal Revenue, et. al.,
Defendants and Appellants,
v.
HIRAM WALKER & SONS, LTD.,
Plaintiff and Appellee.

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MEMORANDUM FOR APPELLEE.

Alfred Lucking,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

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MEMORANDUM.

On the hearing the question was asked from the bench: "Why should exportation of liquor from the United States be prohibited and still the practice of 'transit in bond' be permitted?

Two answers are suggested:

I. In the words of Judge Tuttle in his opinion (Rec., pp. 24, 25):

> "It is urged by the government that the prohibition in the statute against the exportation of intoxicating liquor from the United States negatives an intention to confine its application to the use of such liquor within the United States. This argument overlooks the close relation between manufacture and exportation and the incentive to engage in the former which is furnished by the right to engage in the latter; and it was doubtless considered, and not without reason, that to forbid the exportation of intoxicating liquor from, would tend to make easier the

enforcement of the prohibition against its manufacture and possession in, the United States. It can not, however, be said that such a relation exists between the trans-shipments in question and the prevention of the use of intoxicating liquor as a beverage within the United States. To hold otherwise would be in effect to ignore the efficacy and effect of the protection afforded such trans-shipment by the United States customs officers and other officials under whose supervision they are conveyed in transit through the United States."

II. Another and to my mind a compelling reason is:

When our government forbids the exportation of liquors from the United States, *it is regulating and controlling the conduct of our own citizens—it is forbidding the traffic on the part of our citizens.* This is not at all the case in "conveyance in transit through the United States," which is simply permitting the British to conduct *their* business in foreign countries as in the past. We are simply extending ordinary international comity, in sending across our territory, in the most convenient way, their merchandise, without hurt to ourselves—and which practice is reciprocated in kind, in much larger measure. The commerce in question is legitimate under their laws and customs, which we do not seek or wish to control or regulate.

Respectfully submitted,

Alfred Lucking,
Counsel for Appellee.